

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman  
Kristine L. Svinicki  
George Apostolakis  
William D. Magwood, IV  
William C. Ostendorff

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In the Matter of )

ENTERGY NUCLEAR GENERATION COMPANY and )  
ENTERGY NUCLEAR OPERATIONS, INC. )

(Pilgrim Nuclear Power Station) )

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) Docket No. 50-293-LR  
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**CLI-12-21**

**MEMORANDUM AND ORDER**

Jones River Watershed Association (JRWA) and Pilgrim Watch (collectively, Petitioners) seek review of LBP-12-11,<sup>1</sup> in which the Licensing Board denied their request for hearing and motion to reopen the record to consider a contention regarding the roseate tern, a federally-listed endangered species.<sup>2</sup> For the reasons set forth below, we deny the petition for review.

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<sup>1</sup> LBP-12-11, 75 NRC \_\_ (June 18, 2012) (slip op.).

<sup>2</sup> *Jones River Watershed Association and Pilgrim Watch Petition for Review of Memorandum and Order (Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention) LBP-12-11, June 18, 2012 (July 3, 2012) (Petition)*. Petitioners state that their petition may become moot if the U.S. Fish and Wildlife Service grants their request to reinstate consultation for the roseate tern. *Id.* at 2. The record does not reflect a response from Fish and Wildlife.

## I. BACKGROUND

This proceeding concerns Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.'s (collectively, Entergy) application to renew the operating license for the Pilgrim Nuclear Power Station for an additional twenty years.<sup>3</sup> The NRC Staff accepted the application for review and published a notice of opportunity for hearing in the *Federal Register* in March 2006.<sup>4</sup> In response to the notice, Pilgrim Watch and the Commonwealth of Massachusetts filed petitions to intervene and requests for hearing. JRWA did not request a hearing at that time. The Board granted Pilgrim Watch's hearing request, and admitted two contentions: Contention 1, which challenged Entergy's aging management program for buried piping; and Contention 3, which challenged certain aspects of the severe accident mitigation alternatives analysis in Entergy's Environmental Report.<sup>5</sup> The Board denied Massachusetts' hearing request.<sup>6</sup> Contentions 1 and 3 were later resolved in favor of Entergy.<sup>7</sup> Pilgrim Watch, individually, as well as jointly with JRWA, filed a number of proposed new contentions, including

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<sup>3</sup> The history of this lengthy proceeding has been well documented; we reiterate only the procedural history relevant to the instant petition for review. The Director of the Office of Nuclear Reactor Regulation issued the renewed license on May 29, 2012.

<sup>4</sup> Entergy Nuclear Operations, Inc., Pilgrim Nuclear Power Station; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License No. DPR-35 for an Additional 20-Year Period, 71 Fed. Reg. 15,222 (Mar. 27, 2006).

<sup>5</sup> LBP-06-23, 64 NRC 257, 348-49 (2006).

<sup>6</sup> *Id.* at 349. See CLI-12-6, 75 NRC \_\_, \_\_ (Mar. 8, 2012) (slip op. at 1-4) (providing a history of Massachusetts' participation in this matter).

<sup>7</sup> See LBP-08-22, 68 NRC 590, 610 (2008), *petition for review denied*, CLI-10-14, 71 NRC 449, 477 (2010); LBP-11-18, 74 NRC 29 (2011), *petition for review denied*, CLI-12-1, 75 NRC \_\_ (Feb. 9, 2012) (slip op.).

the contention at issue here regarding the roseate tern, after the Board had closed the evidentiary record.<sup>8</sup> This is the last remaining contention pending either before us or the Board.<sup>9</sup>

Pilgrim Watch and JRWA claim that the Staff violated the Endangered Species Act and the National Environmental Policy Act (NEPA) by failing to consider potentially adverse impacts to the roseate tern from operation of the Pilgrim station for an additional twenty years.<sup>10</sup> They argue that the Board should have admitted JRWA as a party to the proceeding, and reopened the record to consider adverse impacts.<sup>11</sup> Entergy and the Staff oppose the petition for review.<sup>12</sup>

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<sup>8</sup> See CLI-12-15, 75 NRC \_\_ (June 7, 2012) (slip op.); CLI-12-10, 75 NRC \_\_ (Mar. 30, 2012) (slip op.); CLI-12-3, 75 NRC \_\_ (Feb. 22, 2012) (slip op.); LBP-12-16, 76 NRC \_\_ (July 20, 2012) (slip op.); LBP-12-10, 75 NRC \_\_ (May 24, 2012) (slip op.). Neither Pilgrim Watch nor JRWA appealed LBP-12-10 or LBP-12-16.

<sup>9</sup> Pilgrim Watch requested a hearing on two orders that were issued in response to the March 2011 Fukushima Dai-ichi accident; a separate licensing board denied the hearing request. See LBP-12-14, 76 NRC \_\_ (July 10, 2012) (slip op.). Pilgrim Watch's petition for review of that board's order is pending before us. See generally *Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Petitions for Hearing), LBP-12-14, July 10, 2012* (July 20, 2012).

<sup>10</sup> Petition at 2-3. See generally *Jones River Watershed Association and Pilgrim Watch Motion to Reopen, Request for Hearing and Permission to File New Contention in the Above-Captioned License Renewal Proceeding on Violations of the Endangered Species Act with Regard to the Roseate Tern* (May 2, 2012) (Roseate Tern Contention).

<sup>11</sup> See Petition at 1-2.

<sup>12</sup> *Entergy's Answer Opposing Jones Rive[r] Watershed Association and Pilgrim Watch's Petition for Review of LBP-12-11* (July 13, 2012), at 1; *NRC Staff's Answer to Jones River Watershed Association and Pilgrim Watch's Petition for Review of Memorandum and Order (Denying Petition for Intervention and Request to Reopen Proceeding and Admit New Contention)* (July 13, 2012), at 2 (Staff Answer).

## II. DISCUSSION

We will grant a petition for review at our discretion, giving due weight to the existence of a substantial question with respect to one or more of the following considerations:

- (i) a finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) a necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) a substantial and important question of law, policy, or discretion has been raised;
- (iv) the conduct of the proceeding involved a prejudicial procedural error; or
- (v) any other consideration that we may deem to be in the public interest.<sup>13</sup>

Petitioners enumerate what they claim to be the Board's erroneous conclusions of law and findings of material fact.<sup>14</sup> But we find that Petitioners have not raised a substantial question warranting review.

### A. Petitioners' Roseate Tern Contention

Petitioners' contention raised both procedural and substantive challenges to the Staff's environmental review. According to Petitioners, the Staff failed to prepare a biological assessment of impacts to the roseate tern, in derogation of the Endangered Species Act.<sup>15</sup> By way of background, in April 2006, the Staff sent the U.S. Fish and Wildlife Service a request for

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<sup>13</sup> 10 C.F.R. § 2.341(b)(4)(i)-(v).

<sup>14</sup> See Petition for Review at 3-5.

<sup>15</sup> Roseate Tern Contention at 5, 24-25.

a list of protected species that may be in the vicinity of Pilgrim, as required by section 7 of the Endangered Species Act.<sup>16</sup> In response, Fish and Wildlife enclosed a copy of correspondence with Entergy in March 2005 (prior to the submittal of its license renewal application), which concluded that renewal of the Pilgrim operating license was “not likely to adversely affect” the roseate tern, among other listed species.<sup>17</sup> The Staff included this correspondence, as well as a discussion of impacts on the roseate tern, in the final supplemental environmental impact statement (final SEIS).<sup>18</sup> Similar to Fish and Wildlife, the Staff concluded that certain listed species, including the roseate tern, “are unlikely to be adversely affected during the renewal period.”<sup>19</sup> Petitioners argued that the Staff should not have relied on the correspondence between Fish and Wildlife and Entergy, and instead should have prepared a biological assessment to ensure that Pilgrim’s continued operation will not harm the roseate tern or its habitat.<sup>20</sup>

In addition, Petitioners asserted that the Staff, Entergy, and Fish and Wildlife failed to consider new information that calls into question the Staff’s and Fish and Wildlife’s conclusion

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<sup>16</sup> See Franovich, Rani, Branch Chief, Environmental Branch B, Office of Nuclear Reactor Regulation, U.S. NRC, letter to Michael Bartlett, Field Supervisor, U.S. Fish and Wildlife Service (Apr. 25, 2006) (ADAMS accession no. ML061160303) (Species List Request). See generally 16 U.S.C. § 1536.

<sup>17</sup> See “Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Regarding Pilgrim Nuclear Power Station,” NUREG-1437, Supplement 29 (July 2007), Vols. 1 and 2, at E-8 to E-9, E-12 (ML071990020 and ML071990027) (Final SEIS).

<sup>18</sup> See *id.* at 2-96, 4-64 to 4-65, E-8 to E-9, E-12.

<sup>19</sup> *Id.* at 4-64 to 4-65.

<sup>20</sup> See Roseate Tern Contention at 24-25.

that an additional twenty years of operating the Pilgrim station is “not likely to adversely affect” the tern.<sup>21</sup> Petitioners disagreed with the “not likely to adversely affect” finding, arguing that the potential for adverse effects will increase with an increase in the number of roseate terns nesting near the site.<sup>22</sup> As causes, Petitioners cited potential adverse impacts on the terns’ food supply—American sand lance, hake, and Atlantic herring—due to impingement and entrainment; chemical pollution from heavy metals, corrosion inhibitors, and chlorine; and thermal pollution.<sup>23</sup> Petitioners argued that the final SEIS is incomplete because it does not consider this purportedly new information, and they argued that the final SEIS must be supplemented in order to satisfy, in substance, the Endangered Species Act and NEPA.<sup>24</sup>

#### **B. The Board’s Ruling**

The Board rejected Petitioners’ Roseate Tern Contention primarily on timeliness grounds.<sup>25</sup> The Board observed that both the reopening and contention admissibility criteria require that new contentions be timely presented, generally within thirty days of the availability of the information on which the contention is based.<sup>26</sup> Noting that the new contention, in

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<sup>21</sup> *Id.* at 5-6. The NRC does not have authority to rule on challenges to Fish and Wildlife’s compliance with the Endangered Species Act, as the Board correctly notes. See LBP-12-11, 75 NRC at \_\_\_ (slip op. at 4 n.17). See, e.g., 5 U.S.C. § 706; 16 U.S.C. § 1536(n).

<sup>22</sup> Roseate Tern Contention at 27 (quoting *Affidavit of Ian Christopher Thomas Nisbet, Ph.D.* (Apr. 30, 2012), ¶ 21 (Nisbet Affidavit) (appended to Roseate Tern Contention)).

<sup>23</sup> See Roseate Tern Contention at 20-24.

<sup>24</sup> *Id.* at 26.

<sup>25</sup> LBP-12-11, 75 NRC at \_\_\_ (slip op. at 6).

<sup>26</sup> *Id.* (citing *Southern Nuclear Operating Co.* (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 218 & n.8 (2011)).

addition to challenging the final SEIS, challenges the adequacy of Entergy's Environmental Report, the Board found that Petitioners' claims against the Environmental Report should have been raised before the Staff issued the draft SEIS in December 2006.<sup>27</sup> With regard to the Petitioners' challenges to the final SEIS, the Board found that they "should have been filed, if not within [thirty days of the Staff's publication of the July 2007 final SEIS], then certainly at a time significantly earlier than nearly five years later."<sup>28</sup>

As for Petitioners' remaining claims, the Board found that they were based on information that was "either not new or not materially different from information that was previously available."<sup>29</sup> The Board specifically pointed out that Petitioners' most recent information, a sighting of roseate terns in August 2011, occurred seven months before the contention was filed.<sup>30</sup> The Board also noted that Petitioners' information regarding purported excess chlorine emissions stemmed from as early as 2010.<sup>31</sup> Additionally, the Board rejected Petitioners' argument that a March 2000 fish population report should be treated as new information given that they recently received it, when Petitioners could have requested the twelve-year-old report earlier, or located it themselves in the Agencywide Documents Access

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<sup>27</sup> *Id.* at \_\_\_ (slip op. at 6-7) ("To the extent Petitioners criticize the accuracy of statements in Entergy's [Environmental Report], the time for challenging the [Environmental Report] passed when the NRC Staff released its [draft SEIS].").

<sup>28</sup> *Id.* at \_\_\_ (slip op. at 7).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at \_\_\_ (slip op. at 8).

and Management System (ADAMS), the NRC's official recordkeeping system.<sup>32</sup> And finally, the Board rejected Petitioners' argument that they were justified in filing their contention now, rather than years earlier. The Board did not agree "that a years-long delay" is reasonable.<sup>33</sup>

In addition, the Board found that Petitioners' supporting affidavit from Dr. Nisbet did not "substantively address the reopening criteria."<sup>34</sup> The Board observed that although "[t]he affidavit provides a great deal of information about the roseate tern," it "does not, with any specificity, explain how th[at] information would alter the . . . conclusions . . . regarding the effects of the additional operation of Pilgrim on the tern."<sup>35</sup> The Board further observed that Dr. Nisbet did not suggest "that the information he presents demonstrates an 'exceptionally grave issue,'"<sup>36</sup> which would permit even an untimely motion to reopen the record. And the Board reasoned that the possibility of adverse effects on the roseate tern did not involve a threat to public safety, thus, by definition, it did not constitute an exceptionally grave issue.<sup>37</sup> Based on the Board's findings that Petitioners had not shown good cause for (or otherwise had justified)

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<sup>32</sup> *Id.* Based on the "document properties" information in ADAMS, it appears that the report was not publicly released until April 16, 2012. See Alexander, J.F., Director, Nuclear Assessment, Entergy, letter to David M. Webster, Manager, Massachusetts State Program Office, U.S. EPA (Apr. 11, 2000) (ML061390357) (enclosing redacted version of Pilgrim's § 316 Demonstration). However, as discussed below, we find no basis to review the Board's finding that Petitioners did not show good cause for why they did not request the document earlier, considering that the report is referenced in both Entergy's Environmental Report and the draft SEIS.

<sup>33</sup> LBP-12-11, 75 NRC at \_\_ (slip op. at 9).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at \_\_ (slip op. at 10).

their delay, and that Dr. Nisbet's affidavit did not demonstrate either an exceptionally grave issue or a materially different result in the Staff's analysis, the Board concluded that the contention failed to meet the reopening requirements in 10 C.F.R. § 2.326 and the timeliness requirements in 10 C.F.R. §§ 2.309(c) and 2.309(f)(2).<sup>38</sup> Accordingly, the Board dismissed the Roseate Tern Contention and denied Petitioners' request for hearing and motion to reopen the record.<sup>39</sup>

### **C. Analysis**

Petitioners argue on appeal that the Board misapplied the reopening rule and the timeliness standards for new contentions.<sup>40</sup> In particular, they take issue with the Board's application of a "thirty-day rule" for determining timeliness that does not exist in the regulations, as well as the Board's safety-based definition of an "exceptionally grave issue."<sup>41</sup> Petitioners also argue that the Board ignored their showing that the balancing test in section 2.309(c) tips in favor of allowing their contention to go forward despite its lateness.<sup>42</sup>

Further, Petitioners assert that the Board erred in finding that Dr. Nisbet's testimony is not materially different from previously available information. Petitioners specifically list three

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at \_\_\_ (slip op. at 11). In dicta, however, the Board questioned whether the Staff followed appropriate procedure, suggesting that if, as the Staff asserted, the final SEIS should be considered to be the "functional equivalent" of a biological assessment, then the Staff should have submitted it to Fish and Wildlife. *Id.* at \_\_\_ (slip op. at 10). We need not address this issue in light of our ruling today.

<sup>40</sup> Petition at 3-4.

<sup>41</sup> *Id.* at 3-4, 12-14.

<sup>42</sup> *Id.* at 4.

areas of purported materially different information in Dr. Nisbet's affidavit—Dr. Nisbet's statements that: (1) roseate terns are not "transient," and more terns nested near Pilgrim station in 2011 than in previous years; (2) operation of the plant has a "significant potential for adverse effects" on the roseate tern; and (3) pollutants discharged from the facility have the potential to harm roseate terns or their food supply.<sup>43</sup> Petitioners also challenge the Board's finding that Petitioners failed to explain why they did not request the March 2000 fish population study earlier, as well as the Board's "acceptance" of the Staff's argument that the SEIS operated as the functional equivalent of an Endangered Species Act biological assessment.<sup>44</sup>

We find that Petitioners have not raised a substantial question regarding the Board's application of the reopening rule or the timeliness criteria for new contentions. As Petitioners recognize, because the Board closed the record in June 2008,<sup>45</sup> they must meet the reopening standards in section 2.326 to have their contention admitted.<sup>46</sup> A motion to reopen a closed record must be timely.<sup>47</sup> When determining whether a new contention is timely for the purposes of reopening a record, we look to whether the contention could have been raised earlier—that is, whether the information on which it is based was previously available or whether it is

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<sup>43</sup> *Id.* at 5-7.

<sup>44</sup> *Id.* at 5. Petitioners also argue that the Board violated NEPA by not requiring the Staff to provide the final SEIS to Fish and Wildlife. *Id.* at 4. See *supra* note 39.

<sup>45</sup> See Memorandum and Order (Ruling on Pilgrim Watch Motions Regarding Testimony and Proposed Additional Evidence Relating to Pilgrim Watch Contention 1) (June 4, 2008), at 3-4 (unpublished).

<sup>46</sup> See CLI-12-3, 75 NRC at \_\_\_ (slip op. at 10-11).

<sup>47</sup> 10 C.F.R. § 2.326(a)(1).

materially different from what was previously available, and whether it has been submitted in a timely fashion based on the information's availability.<sup>48</sup>

As the Board observed, the most recent supporting information in Petitioners' new contention dates from August 2011, seven months before Petitioners filed their motion to reopen and request for hearing.<sup>49</sup> The rest of Petitioners' supporting information is several years old. Although "timely" is not expressly defined by months or days in our regulations, we, as well as our licensing boards, typically consider thirty to sixty days from the initiating event a reasonable deadline for proposing new or amended contentions.<sup>50</sup> We find no substantial question in the Board's determination that Petitioners' (at least) seven-months delay is unreasonable under either the reopening rule in 2.326(a)(1) or the timeliness requirements in 2.309(f)(2).

Moreover, the Staff published the draft SEIS in December 2006.<sup>51</sup> After reviewing and responding to public comments on the draft, the Staff published the final SEIS in July 2007.<sup>52</sup> Our contention pleading rules are designed with the expectation that petitioners will alert us to issues early on—when they arise—so that we may address them as part of the license

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<sup>48</sup> See, e.g., CLI-12-10, 75 NRC at \_\_\_ (slip op. at 17-18). See also 10 C.F.R. § 2.309(f)(2).

<sup>49</sup> See LBP-12-11, 75 NRC at \_\_\_ (slip op. at 7).

<sup>50</sup> See, e.g., *Vogle*, CLI-11-8, 74 NRC at 218 n.8 ("A thirty-day window [for filing new contentions] is in line with our general practice."); *Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-11-2, 73 NRC 333, 342 n.43 (2011) ("We and our Licensing Boards generally consider approximately 30-60 days as the limit for timely filings based on new information.").

<sup>51</sup> See generally "Generic Environmental Impact Statement for Nuclear Plants, Regarding Pilgrim Nuclear Power Station" (Draft Report for Comment), NUREG-1437, Supplement 29 (Dec. 2006) (ML063260173) (Draft SEIS).

<sup>52</sup> See generally Final SEIS.

application review.<sup>53</sup> “By participating in our proceedings, intervenors accept the obligation of uncovering relevant, publicly available information.”<sup>54</sup> Here, Petitioners waited several years before submitting their Roseate Tern Contention, when they could have filed it in response to the Staff’s publication of the final SEIS, if not earlier. Given our long-standing regulatory scheme and case law supporting the early raising of issues, we decline to accept Petitioners’ argument that they were justified in delaying their contention.<sup>55</sup> Nor do we accept Petitioners’ argument that the Board should not have expected Petitioners to request the March 2000 fish population report at an earlier date.<sup>56</sup> Although, as Petitioners explain,<sup>57</sup> the report was not publicly available on the NRC website until a few weeks before Petitioners filed their contention, the report was referenced extensively in Entergy’s Environmental Report and the December

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<sup>53</sup> See CLI-12-10, 75 NRC at \_\_\_ (slip op. at 4) (“Our rules provide a balance, allowing for late-filed contentions based on genuinely new information, yet at the same time helping to assure an efficient, focused hearing process. We long have stressed that our proceedings would be incapable of attaining finality if contentions—that could have been raised at the outset—could be added later at will, regardless of the stage of the proceeding.”); *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19, 22 (1998).

<sup>54</sup> *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-12-13, 75 NRC \_\_\_, \_\_\_ (June 7, 2012) (slip op. at 7 n.30) (citing *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1048 (1983)).

<sup>55</sup> See Petition at 10-11 (citing *Affidavit of E. Pine duBois* (Mar. 6, 2012), ¶ 22 (appended to Roseate Tern Contention)).

<sup>56</sup> See *id.* at 8-10 (asserting that the report was not made publicly available in ADAMS until April 16, 2012, therefore the Board “has in essence ruled that it is acceptable for the NRC and Entergy to withhold the . . . report until the last minute”).

<sup>57</sup> See *id.* at 8.

2006 draft SEIS.<sup>58</sup> Thus, Petitioners could have requested a copy of the report from either Entergy or the Staff several years ago.<sup>59</sup> Like the Board, we do not agree with Petitioners that a years-long delay is reasonable.<sup>60</sup>

We also find that Petitioners have not shown that their delay should be excused on the theory that they have raised an “exceptionally grave issue.” Our reopening rule provides an exception to the timeliness requirement, permitting consideration of an exceptionally grave issue even if it is untimely presented.<sup>61</sup> The Board analyzed our case law and regulatory history and narrowly interpreted “exceptionally grave” as limited to issues affecting public safety, and thus did not apply the exception to Petitioners’ environmental claim.<sup>62</sup> But we do not interpret our

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<sup>58</sup> See, e.g., Pilgrim Nuclear Power Station, Applicant’s Environmental Report, Operating License Renewal Stage (Jan. 25, 2006), at 2-2 to 2-6, 2-36 (ML060830611); Draft SEIS at 2-34 to 2-48, 2-137.

<sup>59</sup> In addition, Petitioners assert that they have been “denied access to the 2001 EPA-financed Tetra Tech report critiquing the . . . conclusions [in the March 2000 fish population report].” Petition at 9. This report is an EPA document, and it appears that Petitioners have filed a Freedom of Information Act appeal after EPA denied their request for the document. See Hennes, Seth, and Crystal, Howard M., letter to National Freedom of Information Officer, U.S. EPA (Apr. 27, 2012), at 1-4 and Attachments 1 and 2 (appended to Roseate Tern Contention). We have no authority to rule on a request for access to a document controlled by the EPA. Moreover, the Staff states that it did not rely on this report in the SEIS “or in any other document related to the Pilgrim license renewal.” Staff Answer at 12.

<sup>60</sup> For the same reasons, we find no basis to review the Board’s finding that Petitioners had not shown good cause for their lateness under 10 C.F.R. § 2.309(c), or otherwise demonstrated that the balance of the remaining factors weighs in their favor.

<sup>61</sup> 10 C.F.R. § 2.326(a)(1).

<sup>62</sup> See LBP-12-11, 75 NRC at \_\_\_ (slip op. at 9-10) (citing Criteria for Reopening Records in Formal Licensing Proceedings, 51 Fed. Reg. 19,535, 19,536 (May 30, 1986); *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-00-12, 52 NRC 1, 5 (2000)).

case law and regulatory history so narrowly.<sup>63</sup> We have not expressly defined “exceptionally grave,” and we do not do so here, except to clarify that an untimely raised environmental issue could be “exceptionally grave,” depending on the circumstances of the case and the facts presented. We are not convinced that the exception should apply here, however. The information that Petitioners offered in support of their contention is not materially different from what the Staff already considered in the draft and final SEIS, and Petitioners do not show how the roseate tern will be adversely affected by continued operation of the Pilgrim station.

Just as Dr. Nisbet notes that there are increasing numbers of terns nesting within a few miles of the site, the final SEIS recognizes that the roseate tern population in Massachusetts has been slowly increasing.<sup>64</sup> The final SEIS likewise acknowledges the presence of roseate terns on beaches within a few miles of the Pilgrim station and discusses their migratory patterns.<sup>65</sup> And the final SEIS considers impacts on aquatic species, including fish that provide a source of food to the tern, from Pilgrim’s cooling water intake and discharge (for example, impacts from impingement and entrainment and effluent and thermal discharges).<sup>66</sup> Dr. Nisbet does not specify how an increase in potential adverse effects will follow an increase in the number of terns at the site, nor does he show how the Staff’s “not likely to adversely affect”

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<sup>63</sup> *Hydro Resources* involved a public health and safety issue, and it was decided on the particular facts presented. See *Hydro Resources*, CLI-00-12, 52 NRC at 5. Further, in codifying the reopening requirements, the more neutral “exceptionally grave issue” language was chosen over the case-law based “sufficiently grave threat to public safety” phrasing. See 51 Fed. Reg. at 19,536.

<sup>64</sup> See Nisbet Affidavit ¶¶ 8-9, 21; Final SEIS at 4-64.

<sup>65</sup> See Nisbet Affidavit ¶¶ 13-14; Final SEIS at 2-96, 4-64.

<sup>66</sup> See Nisbet Affidavit ¶ 19; Final SEIS ch. 2, 4.

conclusion is incorrect, considering that the Staff reviewed similar information. At bottom, although potential harm to an endangered species might rise to the level of an “exceptionally grave issue,” Petitioners have not shown that such harm is likely to occur here.<sup>67</sup> Indeed, Petitioners’ support would have been insufficient to satisfy the general admissibility requirements of 10 C.F.R. § 2.309(f)(1), let alone this more stringent reopening standard.<sup>68</sup> We therefore decline to review the Board’s application of the “exceptionally grave issue” provision.<sup>69</sup>

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<sup>67</sup> We reiterate that this “narrow exception” “will be granted rarely and only in truly extraordinary circumstances.” 51 Fed. Reg. at 19,536.

<sup>68</sup> See CLI-12-6, 75 NRC at \_\_\_ (slip op. at 18, 25); *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 287 (2009) (noting the “heavy” burden for those seeking to reopen a closed record). Because the Staff considers similar information in the SEIS, we do not see how Petitioners have raised a “genuine dispute.” See 10 C.F.R. § 2.309(f)(1)(vi).

<sup>69</sup> Although the Board found that Dr. Nisbet’s affidavit did not demonstrate a materially different result in the Staff’s conclusions regarding the tern, the Board nevertheless suggested that the Staff should consider the information presented in the affidavit. See LBP-12-11, 75 NRC at \_\_\_ (slip op. at 10). We find this to be unnecessary, however, given that the Staff already considered substantively similar information when reaching its conclusions in the SEIS.

**III. CONCLUSION**

In sum, Petitioners have not demonstrated a substantial question regarding the Board's finding their Roseate Tern Contention impermissibly late. We therefore *deny* their petition for review.

IT IS SO ORDERED.<sup>70</sup>

For the Commission

**[NRC SEAL]**

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 6<sup>th</sup> day of December 2012.

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<sup>70</sup> Commissioner Apostolakis did not participate in this matter.